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International Trade Controls in the University Context

Villanova University
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Introduction and Agenda

- Overview
- The Export Regulatory System
- Fundamental Research Exemption
- Enforcement Landscape
- Overview of Economic Sanctions
- Specific Compliance Issues
- Quiz

The Basics: What is an Export?

- Physical shipment outside the United States
- Accessing technology or software from outside the United States
- U.S. law follows U.S. items
  - *Example*: a U.S. item shipped from France to the UK must comply with U.S. export regulations.

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Technology / Deemed Exports

- Transfer to foreign national is “deemed” an export to her/his home country
- Transfer can occur by:
  - Email
  - Access to FTP (file transfer protocol) site
  - Visual Inspections
  - Conversations in the lab or hall
  - Remote server access

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What is a Foreign National?

- Anyone who is **not** a
  - U.S. citizen,
  - **Green card** holder (Lawful Permanent Resident), or
  - Protected person (*e.g.*, an asylee)

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Foreign Nationals (cont.)

- Person is a FN even if
  - Employed by a U.S. entity
  - FN has a work or **student** visa
  - FN has executed a **non-disclosure agreement** (NDA)

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The Export Regulatory System

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Defense Exports

- Controls on exports of articles developed for military or space applications
  - Includes technical data and services
  - Does not include publicly available info

Defense Exports (cont.)

Who is the Regulator?

The State Department, Directorate of Defense Trade Controls

Defense Exports (cont.)

What regulations govern defense exports?

The International Traffic in Arms Regulations (ITAR)

Defense Exports (cont.)

Where are defense articles and technical data listed?

The U.S. Munitions List (USML)

Defense Exports (cont.)

EXTENSIVE CONTROLS

- License or other authorization is needed before sharing a defense article, service, or technical data with virtually any non-U.S. person.

Defense Exports (cont.)

What is a Defense Service?

- It is **broad**, e.g., furnishing assistance (including training) to foreign person in
  - development
  - manufacture
  - testing
  - maintenance
  - modification
  - destruction
  - *etc.*
  - of a defense article

* NOT a defense service if **only public domain** information is shared

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Defense Service (cont.)

- Use of defense article
  - assistance on "tactical employment" of defense article is covered
  - assistance as to "basic operation" of defense article is not
- Sharing technical data with a foreign person
  - Covered whether in the United States or elsewhere

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Defense Service (cont.)

Be careful: It may be defense service to tell your foreign national graduate student:

- How to modify an imaging camera for a military purpose, *or*
- How to retrieve data from an ITAR-controlled GPS receiver, *or*
- How to develop an ITAR-controlled nerve agent.

So these activities may require a license

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Commercial Exports

- AKA: "Dual-Use"
  - Items not specifically designed or modified for a military purpose
  - Items may have military or other security uses
  - Includes technology and software
  - Does not include publicly available information

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Non-Munitions Exports (cont.)

Who is the Regulator?

The U.S. Commerce Department, Bureau of Industry & Security (BIS)

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Non-Munitions Exports (cont.)

What are the relevant regulations?

The Export Administration Regulations (EAR)

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Non-Munitions Exports (cont.)

Where are items, software, and technology listed?

The Commerce Control List (CCL)

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Non-Munitions (cont.)

What kind of technology is controlled for export under the EAR?

Technology for the development, production, or use of a product

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Non-Munitions (cont.)

What is technology for the development or production of a product?

Development: all stages prior to serial production, *e.g.*, design research, assembly of prototypes, etc.

Production: all production stages, *e.g.*, manufacture, inspection, QC, etc.

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Non-Munitions "Use" Technology

- "Use" technology is controlled if it contains instruction on all of the following:
  - Operation
  - Installation
  - Maintenance
  - Repair
  - Overhaul
  - Refurbishing

*** Important distinctions between ITAR and EAR "use" technology**

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Applying Non-Munitions Controls

- Is an export license needed? It depends:
  - What is the item?
    - Highly sophisticated technology? Everyday item or technology?
  - Where it is going?
    - Country subject to sanctions or non-problematic country?
  - How will it be used?
    - Some uses, such as for nuclear, chemical, and biological weapons, always require a license
  - Who will be using it?
    - Restricted party? Allied government research institution?

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Fundamental Research

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Fundamental Research

- Important licensing exception for universities
- Covers exports / sharing of publicly available research
- FR not subject to EAR or ITAR
  - *EAR*: Deemed export restrictions do not apply
  - *ITAR*: No license for transfer to foreign national

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Fundamental Research: Scope

- Covers basic and applied research in science and engineering …
- … where resulting information is
  - "Ordinarily published"; **and**
  - Shared broadly in the scientific community

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Scope (cont.)

- Resulting information does not *have* to be published but …
- … must be of type that is "ordinarily published"

- Research at university normally qualifies

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Fundamental Research (cont.)

- **BEWARE**: Restricted or proprietary research may not qualify
  - proprietary restrictions on research results
  - specific export limitations due to national security

- **BEWARE:** Can lose use of exemption through clauses in contracts or grants

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Fundamental Research (cont.)

- **BEWARE:** Data transfer from sponsor to university researcher may be restricted
  - **For example, sponsor bars publication of some research**
- **BUT:** Certain prepublication review is allowed
  - **To protect proprietary information, patent rights**

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Fundamental Research (cont.)

- Carefully review sponsored research agreements
- Hidden pitfalls abound
  - "Flow-down" of government restrictions
  - Vague references to export controls or publication
  - **Consortium agreements, side agreements, letters to faculty**

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Fundamental Research (cont.)

- Other Pitfalls:
  - **Sponsor transfers proprietary information in NDA**
  - Campus personnel have access to intranets or controlled facilities
  - **Sponsor shares proprietary source code during project**
  - Sharing research with sanctioned country nationals (different standard)

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The Enforcement Landscape

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Enforcement

- *GAO 2006*: Agencies should "assess vulnerabilities" created by university research
- **FBI: China targeting U.S. universities**
- Commerce Department "outreach" visits to universities and other research centers

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Enforcement (cont.)

UMASS Lowell: March 2013

- Exports of antennae, cables, and atmospheric testing device
- Items valued at approximately $200,000
- All controlled under **EAR99**
- Pakistani recipient was on Entity List
- $100,000 suspended penalty / 2-year probation
- Represented by Arnold & Porter

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Enforcement: Roth

- Professor at **U. Tennessee Knoxville**
- Researching plasma actuators for aerodynamic flow for unmanned aircraft
  - Contract from plasma technology company
  - Technology controlled under ITAR
- Unlicensed technology transfer
  - Employed graduate students from Iran, China
  - Took laptop with sensitive materials to China

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Roth (cont.)

- Convicted on 18 counts
- 4 years in prison
- USSC declined to hear appeal

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Roth (cont.)

- Role of University
  - University counsel issued warnings
  - Cooperated with prosecution
  - No enforcement action against University
- Role of Students
  - Not indicted or pursued civilly
- Role of Professor Roth
  - "Rogue employee"

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Lessons Learned

- Preparedness is key
- How do institutions get in trouble?
  - Miss restrictions/export control issues during award review
  - **Lack of training and education**
  - Fail to implement Technology Control Plan
  - **Fail to appropriately address compliance concerns**
  - Fail to comply with license
    - **E.g., failing to get end-user certificate**
  - Fail to maintain required records

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Overview of Economic Sanctions Regulations

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Sanctions and Embargoes

- Who is the Regulator?

US Treasury Department, Office of Foreign Assets Control (OFAC)

Sanctions (cont.)

- What is the regulatory structure?
  - Comprehensive sanctions (*e.g.*, Cuba, Iran, Sudan)
  - Targeted sanctions (*e.g.*, Burma, Zimbabwe)
  - List-based sanctions: SDNs

Sanctions (cont.)

- Compliance required of:
  - U.S. citizens
  - U.S. residents
  - Persons physically in the United States
  - U.S. entities and their foreign branches
  - For Cuba and Iran, foreign organizations controlled by a U.S. person

Sanctions (cont.)

- Cannot export goods or services to sanctioned parties

- What does this mean in practice?
- You generally **cannot:**
  - provide services to a sanctioned country student unless authorized under student's visa
  - specifically tailor a paper for a Cuban recipient
  - collaborate on research with a researcher in Iran

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Sanctions (cont.)

- Cannot facilitate / support prohibited transaction

- *I.e.*, U.S. person cannot support transaction that he/she could not engage in directly
  - *E.g.*, you can't provide foreign university with engineering service the university will rely on when working in a sanctioned country
  - **But** a license may be available

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Specific Compliance Issues

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Red Flags

Your duty is to identify and report "red flags"

What is a **Red Flag**? Well …

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Red Flags (cont.)

- Is research military or space related?
- Is prime a defense contractor or armed service?
- Is there a publication or foreign national restriction?
- Will project involve foreign travel?
- Are visits to controlled or classified facilities needed?
- Will foreign nationals work on the project?

List is **NOT EXHAUSTIVE**

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Red Flags (cont.)

- If you identify a red flag
  - **HALT** the underlying activity, *and*
  - **Report** the issue to
    - Department Director, and/or
    - Office of Research and Sponsored Projects, and/or
    - Office of General Counsel

**** Your duty is to identify and report red flags**

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USCIS Form I-129

- Requirement since February 2011
- Form requires employers to certify
  - They have reviewed EAR/ITAR
  - No export license is required or worker will be screened until license is obtained
- Relates to:
  - H-1B, H-1B1 (Specialty Occupations, certain FTAs)
  - L-1 (Intracompany Transferee)
  - O-1 (Extraordinary ability or achievement)

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Form I-129 (cont.)

- Government use of information is unclear
  - Could establish knowledge of violation (informal US official remarks)
- Practical implications
  - HR involvement in export controls
  - Coordinate efforts between ORSP and OGC
  - Use as a tool to avoid future issues

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Iran Threat Reduction Act

- Far-reaching law enacted in August 2012
- Expands reach of **Iran sanctions**

- Visa Provision (Sec. 501)
  - Visa denials for certain Iranian students seeking to study in the U.S. to prepare for work in:
    - Iran's energy sector, or
    - Fields related to Iran's nuclear program
  - Implementation unclear
    - How will ultimate use of education be determined?
    - **Unprecedented** area for sanctions in education

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Distance Learning

- General prohibition on directly or indirectly exporting services
  - Includes provision of service **anywhere** when benefit is received by sanctioned party

- Possible allowances:
  - Informational materials
  - General license
  - Outside scope of regulations

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Other Issues to Consider

- Theses / dissertations / conferences
  - Has data in materials been approved for export?
  - Who is the audience?
- Foreign campuses / teaching abroad
  - Can non-U.S. students receive technical data from U.S. professors?
  - What about non-students "auditing" a class?
  - Are there restrictions on lab technicians?

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Export Assessment

- Is project covered by ITAR, EAR, or both?
- Will **foreign persons be involved** in project?
- Will any goods or technology be transmitted outside US?
- Will **foreign travel** be required?
- Does the ***Fundamental Research*** exemption apply?

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Export Assessment (cont.)

- If you think that
  - the project is subject to the ITAR and/or EAR; or
  - there are publication restrictions on the project; or
  - export of work product from the project will be required; or
  - foreign travel with export-controlled technology is necessary; or
  - sanctioned country nationals will be involved in the project; or
- If you have **ANY** other questions or concerns …

… **CONTACT THE OFFICE FOR RESEARCH AND SPONSORED PROJECTS**

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Quiz Time

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Question 1

A celebrated member of the faculty at Non-US University wants to visit your lab. The professor has done ground-breaking work on indestructible widgets for the US military. Can you show this visitor your latest ITAR project?

A. No, unless the project is covered by the Fundamental Research exemption or you have the appropriate export license.

B. Yes, as long as the visitor is not from Cuba, Iran, Syria, Sudan or North Korea.

C. No. This is how Prof Roth got in trouble.

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Question 2

VeryLarge US biotech company wants your help. Under the research grant, VeryLarge can pre-review anything you want to publish and reject or approve it in its entirety. Is this still fundamental research?

A. No. No publication restrictions are allowed for the Fundamental Research exemption to apply.

B. Yes, if the pre-publication review is only for the purpose of protecting the company's IP.

C. Biotech projects are not covered by US export control laws, so the Fundamental Research exemption always applies to those projects.

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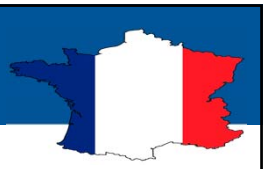
Question 3



Two new graduate students show up offering to work in your lab. One is French and one Chinese. The work is on textiles specially designed for the military and thus subject to ITAR. Which one can work for you without a license?

A. Both students if the work is eligible for the fundamental research exemption.
B. Only the French student. There is an arms embargo on China and not on France.
C. Neither student. If the work is subject to ITAR, a license is required for any foreign national to work on the research.

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Question 4

For collaborative research on Shar Pei skin with your colleague at a foreign institution, you plan to send him botulinum toxin (ECCN 1C351.d.3). Can you do so without a license?

A. No. We have great needs here at home, and our botulinum should stay on U.S. soil.
B. Maybe. Before you share anything with this colleague, you need to consult ORSP or the University's legal office so they can review these shipments.
C. Yes. Botulinum is not a dangerous toxin.

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Question 5

You travel to an international conference in Dubai to present research on satellite thrust engines. Can you present your newest findings?

A. No. This research is covered by the ITAR, so there is no sharing with foreign nationals under any circumstances.
B. Yes, but only if the work constitutes fundamental research.
C. Yes. The global sharing of scientific research is consistent with principles of academic freedom.

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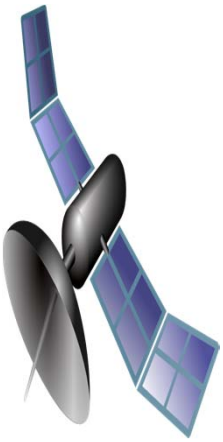
Question 6



It turns out that your satellite thrust research qualifies as fundamental research, so you load the presentation onto your laptop. Are you ready to go to the conference now?

A. It depends on whether any <u>other</u> materials are on your laptop that might be subject to export controls.
B. No. No scientific research is permitted to leave the United States.
C. Yes. The fundamental research exemption trumps everything.

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Question 7

At the Dubai conference, you learn there is a large contingent from the University of **Tehran** in your audience. Can you still give your presentation?

A. No. Iran is on the US sanctions list, so we cannot share any scientific information with any Iranian foreign national.

B. Yes, as long as the conference is approved by the Department of State, the Department or Commerce or OFAC.

C. Probably. The presentation likely qualifies for the informational materials exemption to the Iranian sanctions regulations. However, it might be prohibited to provide additional information to the Iranian attendees, *e.g.*, responding to specific questions after the presentation.

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Question 8

BigTime, US defense contractor, has a sensitive project on which they need help. BigTime says that no foreign nationals can work on the project and the research cannot be published. Can you proceed?

A. No. Villanova will not permit anyone to undertake a project that is biased against non-US persons.

B. Yes, as long as foreign nationals are excluded from the project. The project, and technical data shared and created during the project, are not protected under the Fundamental Research exemption.

C. No. Because of the restriction on foreign nationals, this is not Fundamental Research and thus is not allowed by Villanova.

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Question 9

At a conference, you meet a brilliant Iranian graduate student studying satellite mapping for natural gas exploration. Can she come to study at Villanova with you?

A. No. Iranian students are never allowed to study in the United States.

B. Maybe, so long as she obtains the appropriate immigration papers.

C. Maybe, although if her studies will prepare her to work in Iran's energy sector, this raises a red flag and clearance should be sought from ORSP or the University's legal office.

D. Both B and C.

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Question 10

Your research on Caribbean biodiversity unearths a huge crab colony in Cuba's territorial waters. Can you travel to Cuba to research it?

A. No. Not as long as Florida is a swing state!

B. Yes. I can pursue academic research wherever I deem appropriate.

C. Probably, but because Cuba is a sanctioned country, I likely need an OFAC license that may include specific conditions on what I can / cannot do.

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SUMMARY

- The laws are **complicated**
- You are *not* expected to be an expert
- You <u>are</u> expected to identify compliance **red flags** and report them to compliance personnel
- If you have any questions, stop what you are doing and **<u>seek help</u>**

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Thank you

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